

HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC., *et al.*,

Defendants.

Civil Action No. 2:23-cv-0932-JHC

**REPLY OF THE CHAMBER OF
COMMERCE OF THE UNITED
STATES OF AMERICA IN
SUPPORT OF MOTION FOR
LEAVE TO FILE AMICUS CURIAE
BRIEF**

THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA'S REPLY
IN SUPPORT OF MOTION FOR LEAVE
TO FILE AMICUS CURIAE BRIEF
Case No. 2:23-cv-00932

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1 The FTC at least deserves points for consistency: In response to claims that the
 2 agency's litigation-by-enforcement strategy deprives the regulated community of an
 3 opportunity for notice and comment, the FTC asks this Court to disregard the views
 4 of organizations representing that community. Yet nothing that the FTC says in its
 5 Opposition alleviates the concern, expressed in the Chamber's proposed brief, that
 6 the FTC intends to use a favorable decision here as a cudgel to intimidate other busi-
 7 nesses into abandoning lawful and beneficial marketing practices. Nor does anything
 8 that the FTC says diminish the importance of allowing the Chamber and other Amici
 9 to "explain the impact a potential holding might have on an industry or other group"
 10 before the Court decides their motions. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d
 11 128, 133 (3d Cir. 2002) (Alito, J., in chambers) (citation omitted); *see also Macareno*
 12 *v. Thomas*, 378 F. Supp. 3d 933, 940 (W.D. Wash. 2019) (stating that "[d]istrict courts
 13 may consider *amicus* briefs from non-parties concerning legal issues that have poten-
 14 tial ramifications beyond the parties directly involved" (internal quotation marks
 15 omitted)).

16 The FTC does not respond to the Chamber's explanation that a holding in the
 17 FTC's favor in this case would have wider ramifications beyond the parties, including
 18 by creating uncertainty and harming businesses (particularly small businesses), con-
 19 sumers, and innovation. Instead, the FTC simply asserts without explanation that
 20 the Complaint does not "seek[] to establish a nationwide ban on purported dark pat-
 21 terns." Opp'n at 9. In the same breath, however, the FTC contends that its Complaint
 22 is based on the allegation "that Amazon used, among other strategies, manipulative
 23 design elements that are sometimes called 'dark patterns' as instrumentalities to per-
 24 petrate" alleged violations of the FTC Act and ROSCA. *Id.* It is difficult to compre-
 25 hend how any member of the regulated community could understand such a state-
 26 ment as anything other than a blanket assertion that design elements meeting the

1 FTC's indeterminate definition of dark patterns are "manipulative" as a matter of
2 law and that their use violates the FTC Act and ROSCA.

3 The FTC's remaining contentions are comprehensively refuted in the Reply in
4 Support of Motion of Computer & Communications Industry Association et al. for
5 Leave to File Brief *Amici Curiae* in Support of Defendants' Motions to Dismiss, ECF
6 No. 118, which the Chamber adopts by reference in the interest of economy.

7 CONCLUSION

8 For the foregoing reasons and the reasons stated previously, the Chamber re-
9 spectfully requests that this Court grant its motion for leave to file a brief in this
10 action as *amicus curiae* in support of Defendants' motion to dismiss.

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1 Dated: November 13, 2023

Respectfully submitted,

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LOCAL RULE 7(e) CERTIFICATION

I certify that this memorandum contains 429 words, in compliance with Local Civil Rules.

Dated: November 13, 2023

Respectfully submitted,

s/ Daniel D. Birk

Daniel D. Birk